

## Message Text

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TO SECSTATE WASHDC 3003

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AMEMBASSY KABUL

AMEMBASSY KATHMANDU

USMISSION USUN NY

USMISSION GENEVA

RUSBAYXAMCONSUL BOMBAY 022

AMCONSUL CALCUTTA

AMCONSUL MADRAS

C O N F I D E N T I A L NEW DELHI 17174

E.O. 11652: GDS

TAGS: PINT, IN

SUBJECT: MRS. GANDHI AND THE COURTS

SUMMARY: A NUMBER OF ANTI-GOI DECISIONS BY STATE HIGH COURTS AROUND THE COUNTRY ON WRITS INVOLVING FREEDOM OF ASSEMBLY, HABEAS CORPUS AND FREEDOM OF THE PRESS ILLUSTRATE THAT MRS. GANDHI'S "PROBLEMS" WITH THE COURTS ARE CONTINUING. THE GOI HAS APPEALED THESE DECISIONS TO THE SUPREME COURT. THE UP-COMING SESSION OF PARLIAMENT IS EXPECTED TO DISPOSE OF THESE PROBLEMS THROUGH CONSTITUTIONAL REFORM. THIS COULD TAKE THE FORM OF LEGISLATION CIRCUMSCRIBING OR ELIMINATING THE WRIT AUTHORITY OF THE COURTS. END SUMMARY.

1. FREEDOM OF ASSEMBLY: ON DECEMBER 18 THE BOMBAY HIGH COURT DECISIVELY RULED IN FAVOR OF THE BOMBAY COMMITTEE OF LAWYERS FOR CIVIL LIBERTIES IN THEIR LEGAL DISPUTE WITH THE  
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BOMBAY COMMISSIONER OF POLICE. IN OCTOBER, THE COMMISSIONER

REFUSED THE COMMITTEE PERMISSION TO HOLD A MEETING TO DISCUSS "CIVIL LIBERTIES AND THE RULE OF LAW." HE CITED THE DEFENSE OF INDIA RULES (DIR) THAT ALLOW THE AUTHORITIES, IN THE NAME OF SECURING PUBLIC ORDER AND SECURITY, TO PROHIBIT ANY PUBLIC MEETINGS WHERE EMERGENCY RELATED MATTERS ARE LIKELY TO BE DISCUSSED. ONE JUSTICE DESCRIBED THE COMMISSIONER'S PROHIBITION AS "DRACONIAN" AND LEADING TO "ABSURD RESULTS." HE REFERRED TO THE COMMISSIONER'S "NEAR TOTAL BAN ON MEETINGS" AS OUTRAGEOUS AND MANIFESTLY UNREASONABLE AND CRITICIZED HIM FOR NOT REALLY ASSESSING BEFOREHAND IF THE PROPOSED MEETING OFFERED A THREAT TO THE MAINTENANCE OF LAW AND ORDER. LEADING CONSTITUTIONAL LAWYER NANI PALKHIVALA LED THE GROUP OF TEN ATTORNEYS WHO SUCCESSFULLY ARGUED AGAINST THE GOI. THE HIGH COURT IS CONSIDERING THE GOVERNMENT'S APPEALS FOR A STAY OF ITS JUDGMENT AND AN APPEAL TO THE SUPREME COURT.

2. FREEDOM OF THE PRESS: NEWSPAPERMEN AROUND THE COUNTRY ARE SUCCESSFULLY USING THE WRIT JURISDICTION OF THE HIGH COURTS TO QUESTION DIR BASED CENSORSHIP ORDERS. NEW DELHI 15300 REPORTED THE LOKURKAR DECISION IN WHICH THE BOMBAY HIGH COURT ORDERED THE BOMBAY CENSOR TO WITHDRAW A BAN ON THE PUBLICATION OF A SERIES OF ARTICLES ON CENSORSHIP. THE COURT ALSO OVERRULED A FOLLOW-UP ORDER BY THE CENSOR PROHIBITING PUBLICATION OF THE DECISION ITSELF, AND THE STORY HAS SINCE BEEN CARRIED IN ALL BOMBAY PAPERS. SWATANTRA PARTY FOUNDER MINOO MASANI IS TELLING ASSOCIATES IN BOMBAY THAT HE EXPECTS A FAVORABLE COURT RULING SOON ON A WRIT HIS LAWYERS ARE CURRENTLY ARGUING BEFORE THE BOMBAY HIGH COURT. MASANI IS PROTESTING THE BOMBAY CENSORSHIP, WHICH HE WANTS TO PUBLISH IN HIS LIGHTLY CIRCULATED MAGAZINE FREEDOM FIRST. A NUMBER OF ANTI-CENSORSHIP WRIT PETITIONS ARE ALSO BEFORE HIGH COURTS IN STATES OTHER THAN MAHARASHTRA. (A GUJARAT WRIT PETITION INITIATED BY A RAJKOT, GUJARAT NEWSPAPER WAS DROPPED WHEN THE GOVERNMENT AGREED TO APPOINT A NEW CENSOR IN RAJKOT).

3. HABEAS CORPUS: ON DECEMBER 15, THE SUPREME COURT BEGAN HEARING GOI ARGUMENTS AGAINST NINE HIGH COURT HABEAS CORPUS RULINGS INVOLVING PETITIONS ON BEHALF OF PRISONERS THAT HAD GONE AGAINST THE GOVERNMENT. THE GOI ATTORNEY GENERAL, NIREN DE, IS CLAIMING THAT THE COURTS ARE DEPRIVED OF ALL AUTHORITY TO HEAR HABEAS CORPUS PETITIONS AS LONG AS THE EMERGENCY LASTS. HE IS

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BASING HIS POSITION ON: (A) THE PRESIDENT'S JULY 27 ORDER SUSPENDING THE RIGHT TO MOVE COURTS FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS, (B) POST EMERGENCY MISA AMENDMENTS WHICH HAVE MADE THE GROUNDS OF MISA DETENTIONS (WHICH INCLUDE MOST POLITICAL PRISONERS) STATE SECRETS NOT RELEASABLE TO THE COURTS OR ANYONE ELSE, AND (C) THE ARGUMENT THAT PERSONAL LIBERTIES ARE CONSTITUTIONAL RIGHTS, NOT STATUTORY, NATURAL OR COMMON LAW RIGHTS (NOTE: THE DELHI HIGH COURT'S FAVORABLE RULING ON KULDIP

NAYAR WAS BASED ON NATURAL AND COMMON LAW PRINCIPLES OF JUSTICE WHICH IT DEEMED OVERSHADOWED THE GOI'S STATED LEGAL BASIS FOR HIS DETENTION). QUESTIONING BY SOME OF THE FIVE JUSTICES (RAY, KHANNA, BEG, CHANDRACHUD, BHAGEVATI) APPEARS TO HAVE MADE DE'S RIGID POSITION SOMEWHAT EMBARRASSING. SHANTI BHUSHAN AND FORMER BOMBAY HIGH COURT JUDGE V.C. TRAKUNDE ARE REPRESENTING THE PRISONERS. A DECISION IS NOT EXPECTED BEFORE FEBRUARY.

4. COMMENT: THE COURT'S ROLE AS A CONSITUTIONAL BASTION AGAINST AUTHORITARIANISM IN INDIA CONTINUES TO BE A STUMBLING BLOCK FOR MRS GANDHI AND EXECUTIVE POWER. IN OUR LAST MESSAGE ON CONSITUTIONAL REFORM WE DISCUSSED THE POSSIBILITY OF PARLIAMENT TAKING ON CONSITTUTIONAL POWERS TO DISMANTLE THE COURT'S PRE-SENT AUTHORITY DURING THE NEXT SESSION OF PARLIAMENT BEGINNING JANUARY 5. THE GOI COULD ALSO USE THE UPCOMING SESSION TO ACCOMPLISH THROUGH NEW LEGISLATION WHAT ITS ATTORNEY GENERAL VU ARGUING IN COURT BY SEVERELY CIRCUMSCRIBING OR EVEN ELIMINATING THE WRIT POWERS OF THE SUPREME COURT AND THE HIGH COUNTRS UNDER ARTICLES 32 AND 226 OF THE CONSITUTION (RESPECTIVELY). THIS WOULD IN EFFECT STRICTLY LIMIT OR ALTOGETHER BOTTLE UP THE LEGAL CHANNELS AVAILABLE TO MOVE THE COURTS. AT THIS POINT, WE STILL HAVE NO FIRM EVIDENCE THAT THE PM HAS DECIDED TO TAKE EITHER OF THESE COURSES IN THE NEXT MONTH.  
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